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No. 84-453

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

vs.

WALTER McCOVEY, JR., and LANCE R. WILKIE,
Respondents.

On Writ of Certiorari to the California Supreme Court

PETITIONER'S REPLY BRIEF (RULE 22.5)

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I

THE EQUAL FOOTING DOCTRINE ISSUE RAISES SIGNIFICANT, UNRESOLVED FEDERAL QUESTIONS.

The respondent, in arguing that the Equal Footing Doctrine does not apply here, cites several decisions of this Court for the proposition that Congress has "plenary power" over wildlife and over Indian affairs. Res. Br. 20-21. Therefore, it is argued, it is relevant only whether the federal action is "necessary or justifiable in the fulfillment of a federal objective," not whether the reservation was created before or after statehood. Res. Br. 20.

This Court's decisions cited by respondent did not affect or involve state sovereign interests in navigable waters acquired under the Equal Footing Doctrine. See, *e.g.*, *Hughes v. Oklahoma,* 441 U.S. 322 (1980) (state control of wildlife subject to Commerce Clause); *Kleppe v. New Mexico,* 426 U.S. 529 (1976) (Congress has constitutional power to control wildlife on federal lands); *Camfield v. United States,* 167 U.S. 518 (1897) (United States has rights of ordinary proprietor in federal lands). Thus, the decisions do not suggest any limitation on state sovereign interests under the Equal Footing Doctrine.

Moreover, the respondent makes no reference whatsoever to this Court's decisions in *Montana v. United States,* 450 U.S. 544 (1981), and *United States v. Holt State Bank,* 270 U.S. 49 (1926), in which this Court held that the Equal Footing Doctrine limits the power of Congress to infringe on state sovereign interests in navigable waters. *Montana* and *Holt State Bank* squarely hold that Congress can grant "proprietary" interests in navigable waters during the pre-statehood period, but not during the post-statehood period. Pet. 12-13. Since this analysis was followed in *United States v. Winans,* 198 U.S. 371 (1905), where this Court held that the State of Washington cannot abridge

Indian fishing rights granted by treaty during the *pre*-statehood period, the clear implication is that Congress—much less the Secretary of the Interior—cannot grant Indian fishing rights during the *post*-statehood period. At most, the respondent's argument shows that this Court's decisions holding that Congress has "plenary" power over wildlife and over Indian affairs are in conflict with this Court's decisions holding that Congress cannot grant "proprietary" rights during the post-statehood period, and this Court should grant the petition to resolve the conflict.[1]

II

THE RESPONDENT HAS FAILED TO RESPOND TO THE PEOPLE'S ARGUMENT CONCERNING THE "SURROUNDING CIRCUMSTANCES" OF THE RESERVATION CREATION.

The petition notes that the U. S. Attorney General opined in 1891 that the federal government lacked the right to interfere with California's sovereign interests in the Klamath River, and that the executive order creating the reservation, following the Attorney General opinion, specifically limited the reservation to "a tract of country one mile in width *on each side* of the Klamath River." Pet. 1, 16-17 (emphasis added). The respondent makes no reference to the Attorney General opinion, or the extent to

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[1]The respondent also argues that the reserved water rights doctrine, under which the federal government has the right to use water on reserved federal lands, limits California's sovereign rights in the Klamath River. Res. Br. 21. As explained in the petition, the reserved rights doctrine is limited to federal water rights, which are not in question here. Pet. 13 n. 10. Further, it would be inappropriate to extend the doctrine to this case, because the federal government otherwise would be able to claim a proprietary interest in resources which are an incident of navigable waters, a result that this Court has rejected in other contexts. See Amici Curiae Brief of States of Alaska, *et al.*, in Support of Petition for Writ of Certiorari, 11.

which it influenced the executive order. The respondent thus has failed to respond to the People's argument.[2]

III

THIS CASE PRESENTS SIGNIFICANT QUESTIONS CONCERNING THE STATE'S RIGHT TO REGULATE OFF-RESERVATION INDIAN CONDUCT.

The respondent argues that California's only legitimate interest here is to conserve the fishery resource, and that this interest is not affected by off-reservation sales of fish.

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[2]The respondent cites this Court's statement in *Donnelly v. United States*, 228 U.S. 243, 259 (1913), that it would be "absurd" to treat the executive order as excluding the river from the reservation. Res. Br. 22. This statement is inconsistent with the U.S. Attorney General's 1891 opinion declaring that the executive order, "if it had so declared, would have been ineffective to include the bed and waters of that river as part of the Indian reservation." Pet. 14. Moreover, the *Donnelly* Court, on rehearing, vacated its ruling that the Klamath River was not navigable, which was the basis of the Court's comment that it was "absurd" to exclude the river from the reservation. 228 U.S. at 711-712.

The respondent also asserts that "the very documents from the Justice and Interior Departments upon which Petitioner's present contention is based were expressly considered" in *Mattz v. Arnett*, 412 U.S. 481, 491-492 (1973), and *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454 (1974). Res. Br. 23 n. 4. The U. S. Attorney General opinion was cited in *Mattz* only for the proposition that the Attorney General was "unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation . . . ." 412 U.S. at 491 n. 12, and no reference was made in *Mattz* to the part of the Attorney General opinion declaring that the reservation cannot lawfully include the river.

The respondent's statement that the Attorney General opinion was "expressly considered" in *Five Gill Nets* is incorrect, since the opinion was not mentioned in the decision. Also, the respondent's statement that the Interior memorandum was "expressly considered" in both *Mattz* and *Five Gill Nets* is also incorrect, since the memorandum was issued subsequently to both decisions. See Pet. App. 62.

Res. Br. 24-25. To the contrary, California, as a sovereign, has an obvious interest in uniform application of its laws to all citizens, Indians and non-Indians alike, in non-reservation areas. This sovereign interest underlies the long-established rule that state laws apply to off-reservation Indian conduct in the absence of "express" federal law to the contrary. See, *e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n. 11 (1980).

In effect, the respondent argues, as the California Supreme Court held, that the balancing test—which applies in determining the applicability of state laws *on* Indian reservations—also applies in determining the applicability of state laws *off* the reservation. Pet. 18-19. Under this approach, no distinction exists between on- and off-reservation Indian conduct, because the same balancing test applies in both contexts. This Court, however, has upheld such a distinction, holding that the balancing test applies to on-reservation conduct but that state laws are applicable to off-reservation conduct unless Congress "expressly" directs otherwise. Compare, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 167-168, 170-173 (1973) (on-reservation conduct), with *Mescalero Apache Tribe v. Jones*, *supra*, 411 U.S. at 148-149 (off-reservation conduct).

The respondent also argues that California law is preempted because it conflicts with the Secretary of the Interior's regulations. Res. Br. 27-29. As explained in the petition, no such conflict exists, because both California law and the Secretary's regulations prohibit Indian commercial fishing. Pet. 19. Moreover, even assuming *arguendo* that the Secretary's regulations are intended to occupy the field, it is possible to reconcile the Secretary's regulations with California law without concluding that the regulations have a preemptive effect. That is, the Secretary's regulations at most regulate on-reservation conduct—and thus would permit on-reservation sales assuming that the regu-

lations are amended to authorize such sales—but do not grant immunity from State law to Indians who leave the reservation. This result accommodates any relevant federal or tribal interest, because it allows Indians to sell on the reservation free of State law. This result also accommodates the California policy of uniform application of law in all off-reservation areas. Indeed, this result is apparently contemplated in the directive issued by the Solicitor of the Department of the Interior, instructing federal agents to fully assist and cooperate with State law enforcement officials who prosecute Klamath River Indian commercial fishermen for violation of State laws. See Pet. 19, & App. 64.[3] Thus, federal, tribal and State interests can be accommodated without the conclusion that California law is preempted here.

The respondent also argues that Indian commercial fishing rights are "essential to the fulfillment" of the purposes for which the reservation was created. Res. Br. 36. To the contrary, nothing in the "surrounding circumstances" relating to the reservation creation suggests that Indian commercial rights—as opposed to subsistence rights—were contemplated by Congress or the Secretary of the Interior, and the respondent notably has cited no authority to the contrary. Assuming *arguendo* that the respondent has the right to fish for subsistence under federal law, it does not follow that he has the right to fish commercially.[4]

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[3]Since the respondent states that "the copy [of the Solicitor memorandum] included in the Appendix is not accurate," Res. Br. 11, the People are lodging a copy of the memorandum with the Clerk for this Court's perusal.

[4]This case presents no question concerning the Indians' right to fish for subsistence, since California does not restrict Indian subsistence fishing in the Klamath River.

IV

THE STATE CANNOT BE ESTOPPED FROM ASSERTING ITS SOVEREIGN INTERESTS IN NAVIGABLE WATERS.

The respondent argues that the People are barred by res judicata, collateral estoppel, and waiver from asserting California's sovereign interests in navigable waters. Res. Br. 13-19. As the People's Supplemental Brief makes clear, both this Court and the California courts have squarely held that sovereign interests in navigable waters cannot be lost by estoppel, waiver, or laches. See, *e.g., United States v. California,* 332 U.S. 19, 39-40 (1947); *California ex rel. State Lands Comm'n v. United States,* 457 U.S. 273, 276 n. 4 (1982); *State of California v. Superior Court (Fogerty),* 29 Cal.3d 240, 244 (1981); *County of Los Angeles v. Berk,* 26 Cal.3d 201, 222 (1980). In *United States v. California, supra,* this Court stated:

> "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act." 332 U.S. at 39-40.[5]

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[5]In a similar vein, the California Supreme Court in *Fogerty* stated:

> "Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public." 29 Cal.3d at 244.

Moreover, as the Supplemental Brief makes clear, the district attorney "concession" cited by the respondent was immaterial in its actual context, and was incorrect as a matter of law in any event. Supp. Br. 2. Also, the respondent acknowledges that the People fully asserted the State's sovereign interests in the river before both the California Supreme Court and the Court of Appeal. Res. Br. 8; see Pet. 6. Finally, the scope of California's sovereign interests in the river is immaterial to the question whether California has the right to prevent off-reservation sales, and this question presents an independent basis for this Court to review the case. See Pet. i.

The respondent also argues that res judicata applies because the trial court dismissed the charges based on Fish and Game Code section 2002 and Penal Code section 182, and the People failed to appeal the dismissal. Res. Br. 13-16. This argument appears to be based on law of the case, not res judicata. In any event, the first provision—section 2002—is a lesser included offense in this case,[6] and the second—section 182—is a conspiracy provision unrelated to the questions presented in the petition for writ of certiorari. Therefore, the dismissal of the charges is immaterial to the questions presented here. Section 8685.6, which the trial court did not dismiss, is sufficiently broad to encompass all questions presented in the petition, for this provision makes it unlawful to "sell or possess for sale" certain species "taken in California waters by the use of a gill net." The provision thus prohibits not only sales of fish off the reservation, but also the *possession* for sale

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[6]Section 2002 makes it a *misdemeanor* to possess certain species of fish taken in violation of California law, and section 8685.6 makes it a *felony* to sell or possess for sale certain species taken in California waters by the use of gill nets. Since both provisions apply here, California's failure to appeal the denial of the lesser included offense is immaterial.

of fish unlawfully *taken* from navigable waters in which California has sovereign interests. Therefore, the Superior Court's denial of the additional charges is wholly immaterial here.[7]

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[7]The respondent also asserts that the petition contains "deliberate omissions, mischaracterizations and outright misstatements . . . ," Res. Br. 12, which is surprising since the People filed a Supplemental Brief to accommodate the respondent's perception of the material issues here. The People strongly oppose any suggestion that the petition is misleading or inaccurate in any way.

The respondent also states that the California Court of Appeal denied the People's motion to obtain judicial notice of the two documents appended to the petition, and suggests that the denial "might have been" on grounds that California law limits the reviewing court to the record before the lower court. Res. Br. 8. The respondent omits the crucial fact that California law expressly authorizes appellate courts to take judicial notice of materials that were not introduced before lower courts, Cal. Evidence Code §§ 452, 459, and even to "liberally" take additional evidence in non-jury cases, as here, Cal. Code of Civ. Proc. § 909. Further, the Court of Appeal apparently denied judicial notice only because the materials were irrelevant to the narrow issue on which the court affirmed the conviction, *i.e.*, the off-reservation sale issue. The People then filed a new judicial notice motion in the California Supreme Court, and the Court failed to rule on the motion even though it reversed the conviction.

This background is of course immaterial in this proceeding. This Court has the right to take judicial notice of official governmental documents, see Rule 803(8), Federal Rules of Evidence, and in fact has often considered official governmental documents that were not introduced in lower proceedings. See, *e.g.*, *Mattz v. Arnett*, *supra*, 412 U.S. at 486, & nn. 4, 5, 6; 488, & nn. 7, 8; 490, & n. 10; 491, & nn. 12, 13; 496, & n. 18; 499, & n. 21.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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